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Lay Criminal Courts in Scotland: The Justifications for, and Origins of, the New JP Court

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A. LAY CRIMINAL JUSTICE IN GREAT BRITAIN

A striking feature of criminal justice processes in Great Britain is the prevalence of lay justice. One of its two chief forms is the jury. In this form, a lay jury is fact-finder and verdict-deliverer, but in a court where a professional judge determines the law and passes sentence. The other is the lay court. In this form, a lay person is the fact-finder, law-determiner, verdict-deliverer and sentence-passer, without the participation of any professional judge.[1]

Clearly, this second form is important, for in Scotland, lay courts currently take more than 40% of all criminal cases, a far greater proportion than is heard by juries.[2] Their existence was recently continued by the Criminal Proceedings, etc (Reform) (Scotland) Act 2007 in the guise of the new Justice of the Peace Courts, which replaced the former District Courts and preserved what is possibly the only unpaid, single-judge, lay criminal court in the Western world.[3]

Paradoxically, the 2007 Act continued these lay justices, despite the McInnes report (which led to the Act) recommending (albeit by a majority) that lay justices be replaced by professional "summary sheriffs".[4] This echoed the District Courts Act 1975 which continued lay courts in the guise of District Courts, replacing the former Burgh, Police and old JP Courts, despite a plan that they be replaced by a form of "junior sheriff" (a plan itself superseding the recommendation of the 1973 White Paper which ultimately generated the 1975 Act).[5] Nor was that the first time that abolition of lay courts had been recommended.

The idea of abolition has been resuscitated more recently in the recommendation for the creation of "district judges" in the Gill Report, where it was robustly observed that:[6]

1 There is a professional legal adviser, on whom see R M White, "Justice of the Peace Courts and their legal advisers – a lay court?" 2011 JR 315.

2 See R M White, "The importance of the new JP court" (2011) 15 EdinLR 456, and see now Scottish Government, *Criminal Proceedings in Scotland 2010-11* (2012) table 3.

3 Though some lay justices sit in threes, and there are a handful of Stipendiary Magistrates in Glasgow.

4 Summary Justice Review Committee, *Report to Ministers* (2004) para 7.98.

5 *Justices of the Peace and Justices' Courts: Proposals for Reorganising Lay Summary Justice in Scotland* (Cmnd 5241: 1973).

6 *Report of the Scottish Civil Courts Review* (2009) vol 1 ch 4 para 178.

> [i]f we had been considering this issue from first principles, we would have been minded to recommend that all summary crime should be dealt with by professional judges [including] those cases presently dealt with by justices of the peace.

This raises the question of why Scotland has lay criminal courts which, in turn, raises the question of why there are lay criminal courts at all.

B. WHY LAY CRIMINAL COURTS AT ALL?

(1) A bizarre system?

A criminal justice system relying on lay courts is, on the face of it, bizarre. The only academic study of lay courts in modern Scotland, *Lay Justice?*, asked a generation ago "[why] are people thirled to what might appear to be a haphazard and therefore unjust way of dealing with disputes?".[7]

More recently, a commentator in England and Wales echoed this sentiment, observing that "[m]any a foreign law student has difficulty grasping the fact that magistrates need have no legal education, undergo limited training before sitting in court, are unpaid, and sit only part-time".[8]

Indeed, she reached a conclusion echoing what is implicit in the McInnes Report, the 1973 White Paper, the views of earlier commentators and now the Gill Report, suggesting that "[t]he presence of the lay magistracy [in England and Wales] is probably best explained as a historical legacy that would be an unlikely feature of a modern, rationally conceived system".[9]

(2) Justifications?

(a) Sources for justifications

Given their survival despite such criticism, one might expect a clear conceptual framework for lay courts, and it is in England and Wales that one might most expect it. That jurisdiction is by far the greatest user of lay courts in the United Kingdom (if not the entire world), because (lacking a Sheriff Court equivalent for criminal matters), all criminal cases commence before the mainly lay Magistrates Court[10] (either for committal, or as summary proceedings), and almost all finish there (as summary proceedings).

7 Z K Bankowski, N R Hutton and J J McManus, *Lay Justice?* (1987) 2.

8 L Zedner, *Criminal Justice* (2004) 17.

9 Ibid. Cf her thoughts on the jury, at 16.

10 There are some 31,500 lay justices, but also some 100 full-time, and 150 part-time, professional District Judges (formerly Stipendiary Magistrates): see R Morgan and N Russell *The Judiciary in the Magistrates' Courts* (2000) vii, ix, 26-29 and 109-110.

Such framework should, of course, provide current justifications. (The reasons why Edward III invented Justices of the Peace in 1361 – and James VI imported them 250 years later – shed limited light on justifications for today.) It could be based on Damaška's well-known thesis,[11] which posits that governmental authority is distributed in either hierarchical, or co-ordinated, fashion, and that this distribution is reflected in their legal systems. Damaška argues that co-ordinated authority, typified in "Anglo-American" jurisdictions, relies heavily upon lay officials, roughly equivalent to each other in status, and taking decisions in a practical, "common sense", way. Indeed, he wrote of eighteenth- and nineteenth-century English justices of the peace that "[t]hese amateurs – country gentlemen – epitomized almost completely the ideal of co-ordinated officialdom".[12]

However, as the criticism quoted earlier implies, the literature in England and Wales has not developed this (or, possibly, any relevant) line of thinking. Though extensive, the literature tends to eschew explicit argument about lay courts, offering only an implicit, but very strong, presumption in favour of them.[13] Such discussion as exists seems largely limited to narrative histories of the office of justice of the peace, consideration of acceptable levels of dilution of lay content by professional District Judges, and the listing of desirable judicial qualities. This produces a tangle of unexamined *a priori* assertions (e.g. lay judges are a good in themselves) and untested empirical statements (e.g. lay judges increase public confidence). Perhaps familiarity with lay courts over the centuries has concealed the need for a conceptual framework.

In fact, the most useful examination took place in Northern Ireland, where lay courts, as such,[14] are no longer used. This examination occurred precisely because Northern Ireland's political situation required history to be discounted, and first principles considered. It is found in the *Review of the Criminal Justice System in Northern Ireland*[15] which followed the Belfast Agreement.

11 M R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986) especially chs I and II (although the argument is clearer in his "Structures of authority and comparative criminal procedure" (1975) 84 Yale LJ 480).

12 Damaška, *The Faces of Justice* (n 11) 218.

13 See e.g. R Auld, *Review of the Criminal Courts in England and Wales* (2004) ch 1 paras 19 *et seq* and ch 4 *passim* (but see also Morgan and Russell, *Magistrates' Courts* (n 10), a research paper for that review).

14 It is understood that paid "lay magistrates" (who replaced JPs) sit in pairs in the Youth Court with a professional District Judge, while Magistrates Courts, as such, are entirely staffed by professional District Judges (who replaced Resident Magistrates): Justice (Northern Ireland) Act 2002 ss 9-11, The District Judge (Magistrates' Courts) Order 2008, SR 2008/154 (and see B Dickson *The Legal System of Northern Ireland,* 5th edn (2005) 45-46, 264-270 and 345-346.

15 (2000): for associated research reports, see appendix B.

Research undertaken for it included consideration of lay courts.[16] This did not of itself generate a conceptual framework, but it did include a literature review "to provide a theoretical background",[17] and suggested that contemporary debate centred on three issues: "the actual right of persons to participate in the adjudicative process", "the personality of the participants", and "the actual process of participation".[18]

(b) Arguments for lay courts

An examination of this threefold analysis to seek some "theoretical background" suggests that current justifications for lay courts can be boiled down to some five arguments, concerning respectively:

- *democracy*: people in general should be involved in dispensing justice, as this supplies legitimacy and exercises control over government;
- *representativeness*: representatives of the community should be involved in dispensing justice, as this tends to produce consequential benefits such as local knowledge, enhanced legitimacy, education of the local community, deterrence of future criminality, increased public confidence, effective channels for altruism, improved responsiveness and accountability, and inexpensive, flexible, informal and efficacious administration of justice;[19]
- *ability*: lay persons have relevant skills, including "common sense";
- *economics*: lay courts are better value for money or, at least, cheaper;
- *tradition*: lay courts have existed for centuries and manifest an important tradition of voluntary action.

Usefully, these five arguments are reasonably consonant with three of the four "defences" or "justifications" of lay courts which *Lay Justice?* recorded Scottish lay justices as putting forward:[20]

- *closeness to the community*, including closeness in terms of class, locality, and familiarity, producing acceptability;
- *responsibility*, including judgment by peers, and service to the community;
- *distinctive lay qualities*, including flexibility, being "village elders" with humanity, empathy, charity, sympathy and a sense of humour, and a broad experience of life;
- *trivia*: that is, that their cases were not "real crime".

16 S Doran and R Glen, *Lay Involvement in Adjudication* (2000): despite its wide title, and discussion of "the modules [*sic*] of adjudication", it focussed on lay courts.

17 Para 1.02.

18 Para 2.01.

19 Para 2.02.

20 Bankowski, Hutton and McManus, *Lay Justice?* (n 7) 100-113.

(c) Arguments against lay courts

The obvious argument against lay courts is, of course, simply that they constitute criminal justice dispensed by people who, in the words of *Lay Justice?*, "know nothing about" and are not "expected to know anything about, the law".[21] But proper analysis must take account of all of the arguments in favour outlined above.

An initial problem with those five arguments (and three of the four "defences") is that they prove too much. If lay courts provide democracy, representativeness, suitable abilities, greater economy and reflect important tradition (not to mention exhibiting closeness to the community, responsibility and distinctive lay qualities), why are there professional courts at all? This difficulty is easy to overlook in England and Wales where traditionally over 90% of all criminal proceedings have been before lay courts (and the rest before juries), so it is very difficult not to be tried by lay people. It is more difficult in Scotland, where over half of all criminal proceedings are before a professional judge, without a jury, in the Sheriff Court.

The concession of "triviality" as the fourth "defence" does not resolve this difficulty. It is hardly reassuring in itself. It is impossible to argue in England and Wales, precisely because of the predominance of lay courts. And while it is possible to argue in Scotland because the least important cases go before lay courts, it is difficult, because the most important cases go before lay juries: lay participation in Scotland appears at the two extremes of criminal procedure.

More specifically, the five arguments each invite rejoinders:

- *democracy*: the argument (i) risks confusion with majoritarianism, communitarianism and "sound popular feeling",[22] (ii) looks more like an argument for elected judges[23] and (iii), in Scotland, fails to explain why over half of all criminal proceedings do not require democracy;
- *representativeness*: the argument tends to ignore that (i) the term has at least two meanings, i.e. the "sample" sense (e.g. "demographic representativeness"), where representatives have as many as possible of the characteristics of the represented (regardless of what decisions they actually take) and the "delegate" sense (e.g. "Parliamentary representation"), where representatives are required to represent the interests of the represented (regardless of whether they display any of their characteristics); (ii) any hypothesised "community" is vague, contestable, and hardly applicable in large urban, or widespread rural, settings; (iii) local knowledge, enhanced legitimacy, and the long list of other alleged consequential benefits may not in fact obtain; (iv) local

21 Ibid 2.

22 Which, as "gesundes Volksempfinden", was a National Socialist term for a presumed general will overcoming mere legal standards.

23 See the last sentences of notes 34 and 60 below.

knowledge can degenerate into favouritism, and generate conflicts of interest; (v) this again, at least if understood in the "delegate" sense, looks more like an argument for elected judges;[24] and (vi), in Scotland, it fails to explain why over half of all criminal proceedings do not require representativeness;

- *ability*: the argument (i) tends to confuse questions of "common sense" (i.e. whether lay judges have abilities – "distinctive lay qualities" such as "flexibility... humanity, empathy [etc]" – that professional judges are hypothesised to lack) with questions of "court-craft" (i.e. whether lay judges have the same abilities to run proceedings as professional judges); (ii) in either case, requires identification of the abilities in question; and (iii) is empirical;
- *economics*: the argument is entirely empirical;
- *tradition*: the argument (i) begs the question of what the asserted tradition of "voluntary action" actually is (e.g. simply continuation of "dignified" but empty forms, a vehicle for rewards, or simple inertia) and (ii) fails to explain why courts should provide outdoor relief for the charitably-minded.

Not all these points can be pursued here, but the question presents itself: how have the five arguments operated in Scotland?

C. WHY LAY CRIMINAL COURTS IN SCOTLAND?

(1) A tradition of professionalisation?

Any examination of the history of Scottish courts[25] in terms of their current role risks anachronism and teleology. However, taking that risk, such examination produces no evidence of a strong tradition of lay criminal courts at all, in striking contrast to the position in England and Wales. Indeed, it shows quite the reverse: a clear process over the centuries whereby lay judges were replaced by professionals. Moreover, this is generally seen as a desirable development,[26]

24 Ibid.

25 No full history exists, and the principal general sources are *An Introduction to Scottish Legal History* (Stair Society vol 20, 1958), especially the contributions in Part II.D (which curiously largely omit reference to the old JP Court) and volume 6 of the *Stair Memorial Encyclopaedia* (mentioning that court, but with a much briefer treatment of lay courts generally). However, see also e.g. A E Whetstone, *Scottish County Government in the Eighteenth and Nineteenth Centuries* (1981) chs 1 and 2; L Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots law, 1747 to the Present* (1997) chs 3 and 4 and J Findlay, *All Manner of People: The History of the Justice of the Peace in Scotland* (2000).

26 Despite sociologists of the professions' scepticism about the very idea of professions (though few say much on professionalisation of judges, as such): see e.g. M Rheinstein and E Shils (eds), *Max Weber on Law in Economy and Society* (1966) esp chs VII, VIII and XIV; R L Abel, *The Legal Profession in England and Wales* (1988); R L Abel and P S Lewis, *Lawyers in Society* (3 vols, 1988-89) and R Cotterrell, *The Sociology of Law* (1992) ch 7.

part of the larger process of the "modernisation" of law, and in particular assisting in the separation of powers. In short, there seems to be a strong tradition of professionalisation.

To briefly demonstrate this, we can observe that lay courts were once normal. First, however, some simply died out. Thus the franchise (i.e. Barony, Regality, Stewartry and Bailierie) courts, mainstays of medieval dispensation of justice, were lay,[27] but declined long before the Heritable Jurisdictions Act 1746[28] severely circumscribed the Barony Courts and effectively abolished the others. All disappeared in the succeeding hundred years.[29]

Secondly, others became professional. The medieval predecessors of today's central courts were lay, but the Court of Session Act 1532[30] and High Court of Justiciary Act 1672[31] manifest the triumph of the professional. At local level, this triumph is equally manifest in that curious domino sequence, whereby lay Sheriffs were replaced by professional Sheriff-Deputes, who were supplemented by Sheriff-Substitutes, who became professional and thus, in turn, today's Sheriff.[32]

But there is an exception to the tradition of professionalisation, also at local level. Burgh Courts and the old JP Courts[33] began as lay courts. Reflecting the tradition of professionalisation, the former went into a lengthy decline, and the latter never became particularly significant. But, Lazarus-like, they were revived, then transmuted into the modern lay courts, first as District Courts and now as the new JP Courts. This requires explanation.

27 See e.g. P McIntyre, "The franchise courts", in *Introduction to Scottish Legal History* (n 25) 374.

28 20 Geo 2 c 43.

29 See *Reports of the Commissioners Appointed to Inquire into the Courts of Law in Scotland* (5 reports, 1869-71); Whetstone, *Scottish County Government* (n 25) 4, who suggests that Barony Courts survived the 1746 Act because seen as a rent-collecting agency. It is not entirely clear when they were actually abolished, but it was not by the District Courts Act 1975 s 1, and might conceivably be only by necessary implication of the Abolition of Feudal Tenure (Scotland) Act 2002 s 1.

30 See e.g. A A M Duncan, "The central courts before 1532" and Lord Cooper, "The central courts after 1532" in *Introduction to Scottish Legal History* (n 25) 321 and 341 respectively, and references in Part 1 thereof; see also Lord Emslie, "The Court of Session" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 6 (1988) paras 896-897 and 904 and R K Hannay, *The College of Justice: Essays on the Institution and Development of the Court of Session* (1933).

31 See e.g. Cooper (n 30); W Croft Dickinson, "The High Court of Justiciary" in *Introduction to Scottish Legal History* (n 25) 408; Lord Cameron "The High Court of Justiciary" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 6 (1988) paras 848-882; Whetstone, *Scottish County Government* (n 25) 1-17.

32 See e.g. I A Milne, "The Sheriff Court: before the sixteenth century" and C A Malcolm, "The Sheriff Court: the sixteenth century and after" in *Introduction to Scottish Legal History* (n 25) 350 and 356 respectively, and D Smith "The Sheriff Court" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 6 (1988) paras 1022-1138.

33 Other local courts, such as the Dean of Guild Courts, are not considered.

(2) Lay survivors

(a) Burgh Courts and the old JP Courts – origins and decline

Briefly, Burgh Courts were set up by burgh charters from the twelfth century onwards, originally with wide criminal and civil jurisdiction, and with burgh prosecutors (though also private prosecution), but were presided over by lay bailies appointed according to the burgh charter.[34] Equally briefly, the old JP Courts in landward areas, with the English structure of Petty and Quarter Sessions, also originally had wide jurisdiction, and their own procurator fiscals (though also possibly private prosecution), but were presided over by lay JPs (an office effectively created in 1609),[35] appointed by the Crown.[36]

Further consideration of the early history of these courts is unnecessary,[37] for one modern commentator observed that, by the late 18th and early 19th centuries, in larger centres the Burgh Court did some civil business, but "[a]t the worst, [it] was passing or had passed from the scene".[38] Another observed that JPs had "mostly . . . just let business go",[39] and were not expected to be active, few sitting regularly in court, which in any case was by then, in its criminal jurisdiction, dealing only with regulatory offices – violations of road, licensing (where they were accused of favouritism), poaching (where they were accused of conflicts of interest) and excise laws – the office operating largely as a local honours system.[40]

34 See *Green's Encyclopaedia of the Law of Scotland* vol 9 (1898) 311; G S Pryde, "The Burgh Court and allied jurisdictions" in *Introduction to Scottish Legal History* (n 25) 384; J G Gray, "The District Court" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 6 (1988) paras 1155-1158; Whetstone, *Scottish County Government* (n 25); Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 67-77, 85 and 109; D Robertson and M Wood "Burgh Court Records" in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 98. Burgh Courts, incidentally, appear to provide the only UK example of elected judges.

35 Justices of the Peace Act 1609. The Criminal Justice Act 1587, originally seeking to institute them, seems to have been ineffective because of "God's visitation of the pestilence": see Findlay, *All Manner of People* (n 25) 15-16.

36 See e.g. Gray (n 34) para 1159; J Walker, *Justice of the Peace, Being a Manual for the Use of Justices of the Peace in Scotland* (1931) 12; Whetstone, *Scottish County Government* (n 25) ch 2; Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 67-69 and 76; Findlay, *All Manner of People* (n 25). Curiously, Pryde (n 34) omits them.

37 The jurisdiction of Burgh and JP Courts were discussed in Mackenzie, *Matters Criminal* part II titles V, XI, XIII and XIV; Hume, *Commentaries* ii, 66, 69 and 70. See also Hume, *Commentaries* i, 435 and 465 and ii, 26, 49, 70, 75, 77, 83, 147, 149 and 150, along with Bell's Notes 101, 165 and 168; A Alison, *Practice of the Criminal Law of Scotland* (1833) chs 2, 5, 6, 7 and 9.

38 Pryde (n 34) 389.

39 Whetstone, *Scottish County Government* (n 25) 46.

40 Ibid 39-42 and 59-60, although commentaries on the office of JP were produced. See e.g. R Boyd, *The Office, Powers and Jurisdiction of His Majesty's Justices of the Peace, and Commissioners of Supply, for Scotland* (1794); J H Burton, *A Manual of the Law of Scotland: Civil, Municipal, Criminal and Ecclesiastical; With a Practical Commentary on the Mercantile Law, and on the Powers and Duties of Justices of the Peace and Other Magistrates* (1839).

Also, "[t]he jurisdiction of these courts was certainly surrounded with great confusion", geographically overlapping, with no common procedure, thus affording much discretion as to how proceedings were conducted.[41] Compounding this confusion, provosts and bailies of major burghs became *ex officio* JPs, and so might sit in JP Courts as well as Burgh Courts.

Given the tradition of professionalisation, what justifications underpinned lay courts' survival into modern times?

(b) Justifications and criticisms in 19th century Royal Commissions – bottoming out

Four Royal Commissions, roughly a generation apart, dealt with lay courts in the hundred and fifty years between the Burgh and old JP courts' near "passing... from the scene" and their replacement by District Courts in the 1970s, and might suggest answers. They were the Royal Commission of Inquiry into Law Courts in Scotland, 1833-1839,[42] the Royal Commission Appointed to Inquire into Courts of Law in Scotland, 1869-1871[43] (the reports of both are mines of information on lay courts), the Royal Commission on the Selection of Justices of the Peace of 1910[44] and the Royal Commission on Justices of the Peace of 1948[45] (both concentrating on England and Wales). However, they actually dealt in criticism rather than justification.

Thus, the 1833-39 Royal Commission noted that both Burgh Courts and JP Courts had only occasional criminal sittings, dealing with tiny numbers of petty

41 Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 67 (quoting Hume, *Commentaries* ii, 70 as saying that "the application and extent" of the various courts' powers "are very liable to controversy, and has not been settled by any uniform or consistent practice"). See also ibid 69 and especially references to the Glasgow Burgh and Police Courts at 79-80.

42 Chaired by George Joseph Bell, and producing four reports, as follows: *First Report from His Majesty's Law Commissioners, Scotland* (1834); *Second Report by His Majesty's Law Commissioners, Scotland* (C (1st series) 63: 1835); *Third Report by Her Majesty's Law Commissioners, Scotland: Conveyancing* (C (1st series) 114: 1838); *Fourth Report by Her Majesty's Law Commissioners, Scotland* (C (1st series) 241: 1839).

43 *First Report of the Commissioners Appointed to Enquire into the Courts of Law in Scotland* (C (1st series) 4125: 1869); *Second Report of the Commissioners Appointed to Enquire into the Courts of Law in Scotland* (C (1st series) 4188: 1869); *Third Report of the Commissioners Appointed to Enquire into the Courts of Law in Scotland* (C (2nd series) 36: 1870); *Fourth Report of the Commissioners Appointed to Enquire into the Courts of Law in Scotland* (C (2nd series) 175: 1870); *Fifth Report of the Commissioners Appointed to Enquire into the Courts of Law in Scotland* (C (2nd series) 260: 1871). The commission's membership included the immediate past and current Lord Justice-Generals, and the current and immediately subsequent Lord Justice-Clerks.

44 Report of the Royal Commission on the Selection of Justices of the Peace (Cd 5250: 1910).

45 Report of the Royal Commission on Justices of the Peace 1946-1948 (Cmd 7463: 1948).

crimes.[46] More seriously, it observed that in Burgh Courts:[47]

> The magistrates are nominally the judges; but in all cases requiring professional knowledge, they act by the advice of the Town Clerks, as their legal assessors, so that the ostensible magistrates are not the real judges.

It concluded, in line with the history of decay, that Burgh Courts should be abolished as "no longer adapted to the circumstances of the time".[48]

Abolition did not occur, however, though the 1869-71 Commission came to similar conclusions. Witnesses to it variously professed lofty ignorance as to whether Burgh Courts still existed,[49] thought them not properly conducted,[50] and considered they should be abolished.[51] The principal criticism by the Commission itself, however, was the harshness of the sentences imposed by "a tribunal of fluctuating, untrained and unpaid judges".[52] It levelled similar criticism at JP Courts, where "very heavy pecuniary penalties, with an alternative of a long period of imprisonment" were imposed by "gentlemen selected, often at random", who were also subject to criticism for conflict of interest in poaching cases.[53]

Thus it too recommended abolition of Burgh Courts, though retention of Police Courts[54] (albeit with restricted jurisdiction) and JP Courts (at least in "the remote parts of the country", as an adjunct to their small debt function).[55] A majority (in the tradition of professionalisation) favoured replacement by Stipendiary Magistrates in larger burghs, though the minority feared that this "might weaken the feeling of interest in and responsibility for the peace and good order of the burgh, by which Magistrates ought to be influenced".[56] Nevertheless, all survived again.

The 1910 Commission, though concentrating on England and Wales, did cover Scotland.[57] It did not mention levels of usage (no doubt because these were

46 See e.g. Royal Commission (1833-39), *Fourth Report* (n 42) 201-234 and 252-253.

47 Royal Commission (1833-39), *First Report* (n 42) 72. See also the more extended passage at 72-73, rejecting the idea of Town Clerks as judges.

48 Royal Commission (1833-39), *First Report* (n 42) 72.

49 Royal Commission (1869-71), *Fourth Report* (n 43) Minutes of Evidence Q 676-678 and 871.

50 Minutes of Evidence Q 1747, 7242-7267 and 9748-9749.

51 Minutes of Evidence Q 1407, 1745, 1747, 5367-5374, 5802-5804, 7047-7048, 7240-7244, 9483, 9731-9736, 10,245-10,247 and 10,368.

52 Royal Commission (1869-71), *Fourth Report* (n 43) 38-39.

53 Royal Commission (1869-71), *Fourth Report* (n 43) 39: comparison with "random" selection of juries is not pursued.

54 See n 81 below and associated text.

55 Royal Commission (1869-71), *Fourth Report* (n 43) 39.

56 Ibid.

57 Report of the Royal Commission on the Selection of Justices of the Peace (Cd 5250: 1910). Page 4 offers the sole direct reference to Scotland (although one Commissioner was the Lord Lieutenant of Lanarkshire), comprising three sentences, including "[b]ut their criminal jurisdiction is extremely limited".

overwhelmingly high in England and Wales). Remarkably, however, it conceded that the voluntary system of lay courts "no doubt excludes the existence of a high judicial standard".[58] Even more trenchantly, it observed that "[b]y many who are appointed Justices the office is regarded as one of social distinction only, the duties of the office are forgotten and the discharge of them disregarded".[59]

The principal vice was now "the influence and action of politicians being allowed to secure appointments on behalf of any political party".[60] However, unlike its predecessors, it did not recommend abolition (no doubt because of the overwhelming reliance on them in England and Wales), only remedying the defects by reform of the means of appointment.[61]

This litany of criticism, including recommendations for abolition, seems better suited to explaining a continued decline of lay courts than their continued existence. Certainly, the lack of an explicit articulation of any justifications hinders examination of them in terms of the five arguments. However, it is possible to undertake a tentative examination through those very criticisms, for characteristics criticised for their absence may imply justifications. This possibility is most clear in the 1910 Commission's views on appointment. Following its criticism of the appointment process, it specifically recommended appointment only of those of "moral and good personal character, general ability, business habits, independent judgment, and common sense", though including "persons of every social grade… and working men with a first-hand knowledge of the conditions of life among their own class".[62] This seems to invoke ability, representativeness and tradition as justifications.

The invocation of ability is obvious in the recitation of desirable characteristics such as "general ability". This explicitly appeals to "common-sense" abilities, and was perhaps prefigured in the 1833-39 Commission's concern as to who really judged in Burgh Courts, and probably in the 1869-71 Commission's criticism of unjustifiable sentences and failure to avoid conflicts of interest, though these merge into questions of "court-craft" ability, as does the 1910 Commission's specific complaint of the lack of a "high judicial standard".

The invocation of representativeness is obvious in the recitation of desirable persons, including "every social grade" and "working men", and in reference to

58 Ibid 10.

59 Ibid 13. Cf Minutes of Evidence Q 1605 & 1685. Note that (at Minutes of Evidence Q 1591) the Lord Provost of Dundee identified 190 JPs in Dundee (in mid-2011, there were 7), and declared the JP Court to have no criminal cases (though bailies had more extensive jurisdiction as Police Magistrates).

60 Ibid, Summary of Conclusions and Recommendations 14 at para 6: this followed the rise of mass political parties. It was said at 10 that "direct popular election [of judges] is altogether opposed to English constitutional usage" and would mean "political election".

61 Ibid, Summary of Conclusions and Recommendations 14-15.

62 Ibid. Summary of Conclusions and Recommendations 15, at paras 9 and 10.

"first hand knowledge" as one of the hoped-for consequences. This is clearly "delegate" rather than "sample" representativeness (which also indicates that there is no invocation of democracy as justification, for JPs are to be chosen to operate the criminal justice system well, not to increase citizen participation in government). It was also possibly prefigured in the 1833-39 Commission's concern as to who really judged, and certainly was in the 1869-71 Commission's criticism of often "random" selection of "fluctuating, untrained and unpaid" judges[63] (and in its minority's views on bailies' presumed "feeling of interest in and responsibility for the peace and good order of the burgh").[64]

The invocation of tradition is largely explained by the concentration on England and Wales, and is not prefigured in the earlier Commission's criticisms[65]. However, criticism of the use of the office of JP as a means of granting "social distinction", and of "appointments on behalf of [a] political party", recognised tradition through its pernicious modification into appointment as a vehicle for rewards, rather than as voluntary action.

Thus, overall, it might be inferred that disinterested opinion sought justification of lay courts in "common-sense" abilities and "delegate" representativeness (though they were lacking) while, latterly at least, central and local government found it in a tradition of a local honours system (which was present). But most interestingly, on the evidence of three Royal Commissions over a period of eighty years covering most of the nineteenth century, neither democracy nor economics were considered as justification.

In any case, there was only limited hindrance to a continued tradition of professionalisation, and inadequate explanation for lay courts' survival. Yet the decline was bottoming out and, thereafter, lay courts not only survived, but flourished. How could this be?

(c) Justifications and criticisms through summary procedure and "Police Courts"– revival

Though seemingly tottering to extinction in the nineteenth century, by the 1920s Burgh Courts took up to 70% of all criminal proceedings, and the old JP Courts approaching 10%; in the 1930s, they took up to 60% and 9% respectively;[66] and at

63 Appointment as JP was also recommended to be "accompanied by a formal undertaking on his part to fulfil his fair share of magisterial duties" on pain of required resignation: see ibid, Summary of Conclusions and Recommendations 15 at para 11.

64 Royal Commission (1869-71), *Fourth Report* (n 43) 39.

65 But see Whetstone, *Scottish County Government* (n 25) 39-42 and 59-60.

66 See Criminal Statistics: Statistics Relating to Police Apprehensions, Criminal Proceedings and Reform and Industrial Schools for the Year 1925 (Cmd 3007: 1928) table B and table B in the commensurate

the time of the 1948 Royal Commission they still took 51% and 9%.[67] Lay courts were no longer "passing… from the scene" and were taking the clear majority of criminal proceedings, justifying commentaries on them,[68] handbooks for JPs[69] and the 1948 Commission itself. The reversal of fortune seems Lazarus-like.

It might have flowed from a sudden appreciation of the hitherto neglected democratic argument. Uniquely among the Royal Commissions, the 1948 one produced an explicit justification in democratic terms, declaring that lay justice "gives the citizen a part to play in the administration of justice".[70] This also prevented "the growth of suspicion in the ordinary man's mind that the law is a mystery which must be left to a professional caste", and emphasised "that the principles of the common law, and even the language of statutes, ought to be… comprehensible by any intelligent person without specialized training".[71]

However, it is important not to read too much into this declaration. The 1948 Commission also reiterated the persistent criticism that "a principal weakness" of the selection system was the continued practice of selecting on the ground of "a good record of service to a political party or [being] a reliable member of the party".[72] In any case, the declaration seems inapplicable to Scotland. As noted, citizen participation is absent from most criminal cases here, being present only at the extremes.[73] Indeed, at a time when Burgh (and Police)[74] Courts commonly

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statistics for the year 1930 (Cmd 3963: 1931) and 1936 (Cmd 5583: 1937). The 1910 Commission's lack of reference to levels of use of lay courts conceals the onset of this rise.

67 Royal Commission on Justices of the Peace (n 45) appendix D, indicating that in 1946, out of a total 71,480 adult "crimes" (undefined, but presumably common law) and "offences" (presumably statutory), Burgh [sic] Courts took 3,692 "crimes" and 32,854 "offences", and JP Courts took 778 "crimes" and 5,553 "offences". No provenance is given, but the figures coincide reasonably with those in *Justices of the Peace and Justices' Courts* (n 5) para 8. The Burgh/JP Court differential presumably reflects both population distribution and the propensity of crime to be urban.

68 See e.g. those found in *Green's Encyclopaedia of the Law of Scotland*.

69 See e.g. J Thomson, *Practical Handbook for Justices of the Peace in Scotland* (1920) (incidentally dedicated to Miss Elizabeth S. Haldane, "The First Woman Justice of the Peace in Scotland", and sister of the first Viscount Haldane) and J Walker, *Justice of the Peace* (n 36).

70 Royal Commission on Justices of the Peace (n 45) 214. Its recommendations were essentially ameliorative, largely in relation to selection and appointment: see para 358. Certainly, despite the possible precedents noted earlier, it did not consider elective judges.

71 Para 214: a hope unrealised.

72 Para 20. It appears that the 1910 Commission's recommendation to seek representation of "different views and currents of opinion" in selection was "interpreted to mean representation of the main political parties", so the advisory committees set up thereafter were "overwhelmingly political": para 18. It did not, however, emphasise lack of competence, though see paras 88-94 and 103-107.

73 Incidentally, a minority Report declared that "[h]aving read and heard the evidence submitted to us regarding Scotland, I have formed the clear opinion that the solution… is to have no justices of the peace in Scotland [which would] cause surprisingly little disturbance to the system": ibid 102 and 103.

74 See below.

sat with a single lay judge (as District Courts usually did later, and the new JP Courts usually do now), the same paragraph asserted that:[75]

> ... the cases in which decisions on questions of fact in criminal cases are left to one man ought to be, as they are now, exceptional ... [and that] ... even a judge of the High Court is never asked to undertake the heavy responsibility of trying a criminal case except with the assistance of a jury of laymen, to whom alone is given the decision on the facts.

And in fact, the declaration was not made with Scotland in mind, being buried in a chapter concerning Stipendiary Magistrates in England and Wales.[76]

The explanation for the revival thus lies elsewhere, and largely in the hitherto equally neglected economic argument. A "complex" and "little studied" process[77] involving the "gradual" and "very piecemeal" introduction of police courts produced a "radical... transformation" of summary criminal justice in the nineteenth century.[78] In a sequence of events detached from (though occasionally referred to by) the Royal Commissions, general burghal reform took place, partly through both private local and public general legislation.[79] This increased and consolidated "police powers" ("in the traditional sense of looking after drainage, street lighting and so on"),[80] thereby incidentally producing police forces (in the modern sense), a range of regulatory ("police") offences, and "Police Courts" (that is, in effect, Burgh Courts operating through a clear common statutory procedure, instead of unclear local procedures founded on burgh charters or private local legislation).[81]

Together with consolidation of the position of the Sheriff Court,[82] this meant that "prosecution became much easier", producing "a massive increase in the number and types of crime that were dealt with summarily".[83] Indeed, the "defining feature of the [criminal justice] system... in the later years of the nineteenth century was the summary trial of large numbers of people for minor

75 Royal Commission on Justices of the Peace (n 45) para 214.

76 Ibid.

77 Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 71.

78 Ibid 71.

79 Ibid 69 and 72.

80 Ibid 71-72.

81 Ibid 71-72; Pryde (n 34) 390: Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 74-78 argued that reform of summary procedure took place in three stages, i.e. before 1820 ("many types of process and courts"); 1820-1864, involving "the first statutory attempts to set these procedures on a more regular footing"; and 1864-1908, when "rules of uniform application were developed" in the form of the Summary Procedure (Scotland) Act 1908. Gray (n 34) para 1156 concluded that after the Burgh Police (Scotland) Act 1892, "the distinction between burgh and police courts becomes academic" (and see paras 1157-1158 for discussion of types of police court).

82 Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 70-1.

83 Ibid 69-74.

offences".[84] This "defining feature" continued until the time of the 1910 and 1948 Commissions[85] (and, of course, beyond).

But why, given the Royal Commissions' criticisms of lay courts, was this vast increase in summary proceedings borne by them, and not by increased numbers of Sheriffs or Stipendiary Magistrates?[86] In fact, Burgh Courts were supplemented by professional Stipendiary Magistrates, but only to a very limited extent,[87] and an obvious answer is the economic one. Sheriffs and Stipendiaries cost money, and the offences were minor (conceivably "trivia"), so why spend the money when the rise of the Police Court meant that new, improved, bailies and JPs would continue to do it for free? Also, of course, Sheriffs and Stipendiaries provide a more limited outlet for burghal self-esteem and political emolument, suggesting the continuing power of appointment as a vehicle for reward.

Thus, it was the growth of "regulation" which saved the lay courts. Their revival shows that the modern lay court, whatever its earlier history, is an essentially nineteenth- and twentieth-century creation, reflecting the "defining feature" of "the summary trial of large numbers of people for minor crimes".[88] The revival compromised the trend to professionalisation by shifting from justification by "common-sense" abilities and "delegate" representativeness (on which three Royal Commissions had perhaps rested, but for which four provided little supporting evidence) not to democracy, but to economics, though still tacitly buttressed by pernicious tradition.

Incidentally, the revival also demonstrates an economically driven shift in criminal justice "increasingly estranged from a traditional model of criminal justice"[89] and characterisable as a swing from "due process" (criminal justice as "obstacle course" of safeguards for accused) to "crime control" (criminal justice

84 Ibid 74.

85 Royal Commission on Justices of the Peace (n 45) appendix D, showing "offences" outweighing "crimes" by four to one.

86 The Royal Commission 1910 thought Stipendiary Magistrates outside its terms of reference: see Royal Commission on the Selection of Justices of the Peace (n 44) 14. The 1948 Royal Commission mentions them only once in passing in relation to Scotland: Royal Commission on Justices of the Peace (n 45) para 311. Pryde (n 34) observed that in the 20th century, "much local controversy has ... centred on the merits and demerits of systems of professional and lay magistracies", detecting contradictory trends in the power to appoint Stipendiary Magistrates in the 1892 Act and the power to appoint ex-magistrates as "judges of police" in the Local Government (Scotland) Act 1947.

87 Paid magistrates appeared in Edinburgh in 1805 (later disappearing), and Glasgow later in that century (still remaining), both under private legislation: the Burgh Police (Scotland) Act 1892 permitted them generally, though none were appointed under it. See Gray (n 34) para 1157.

88 Farmer, *Criminal Law, Tradition and Legal Order* (n 25) 74.

89 Ibid.

as "conveyor-belt" processing cases rapidly),[90] later visible in "decriminalised" parking fines, fiscal fines, police conditional offers, and so on.[91]

(d) Justifications and criticisms in the 1973 White Paper, and the 1975 Act – consolidation

A further generation after the 1948 Commission came the 1973 White Paper, *Justices of the Peace and Justices' Courts: Proposals for Reorganising Lay Summary Justice in Scotland*.[92] This appears to be the first official document explicitly seeking to justify Scottish lay courts. In what seemed at the time one of the biggest changes in lay justice ever, it produced (though somewhat paradoxically, as will be seen) the District Courts Act 1975, which transmuted Burgh, Police and the old JP Courts into District Courts. This process therefore demands close attention.

Accurately noting that "little explicit consideration has been given to the part that [lay] courts may play in the evolving pattern of criminal justice",[93] the White Paper's opening paragraphs declared that lay courts had dealt with a substantial proportion of the less serious criminal cases "with a high degree of speed, efficiency and economy",[94] but also that lay judges brought "a practical everyday knowledge of the way of life and social conditions in [their] local community" which was "not less valuable... than the foundation of legal training possessed by the professional judge".[95]

Oddly tucked away in a chapter on the location and number of courts, it also declared that lay summary justice was "a form of participation by members of the public in the responsibilities of government".[96]

However, there was strong criticism as well. Also in its opening paragraphs, the White Paper offered the extraordinarily damning judgment that:[97]

> The qualities of a good judge – judicial conduct, skilled discretion in decisions on bail, verdict and sentence are indeed developed by professional and layman alike by experience in court. For various reasons, continuous and substantial experience, and

90 H L Packer, *The Limits of the Criminal Sanction* (1968) ch 8.

91 See R M White, "The Summary Criminal Proceedings (Abolition) (Scotland) Act 2007? A critical view of Part 3 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007" 2008 JR 215.

92 Cmnd 5241: 1973. Although Burgh and Police Courts were enormously more active than the old JP Courts, the "JP" name was used in order to indicate the new court's role "as an organ of Crown justice... free from other associations" (para 4).

93 Para 1.

94 Para 1 (although para 19 noted that many burgh and old JP courts "have very little business": crime being a largely urban phenomenon).

95 Para 3.

96 Para 22.

97 Para 3.

> training to assist the layman to assimilate it, has been lacking on the whole to the lay summary bench as at present organised in Scotland.

Elsewhere, it added that "[f]or the most part... the training given to burgh magistrates and justices of the peace is rudimentary or non-existent".[98] In any case, many "justices of the peace do little or no work in the [old] JP Court" and, while bailies in some burghs were "heavily committed to the burgh [and police][99] court", any individual bailie's commitment might only be for short periods, over a limited number of years.[100] It also noted a continuing decline in the proportion of cases taken by lay courts, with Burgh [*sic*] Courts[101] now at 40% and the old JP Courts at 5%.[102]

Further, the White Paper observed that it was "regrettably necessary to say yet again that appointment as a justice of the peace is not a form of reward for public services or of recognition of the worthiness of individuals, social groups or geographical communities".[103]

Thus the newly explicit discussion of justifications for lay courts contains an interesting mixture of familiar themes. Unsurprisingly (given the reasons for the revival), "speed, efficiency and economy" indicated justification by economics (though unsupported by actual data). Also unsurprisingly (in view of the Royal Commissions' repeated adverse comments), reference to "qualities of a judge" being "lacking", and to "appointment as a justice of the peace... not [being] a form of reward", rehearsed criticisms about lack of "court-craft" abilities and pernicious tradition, respectively. But more surprisingly (since, though the 1910 Commission desiderated it, no Commission reported evidence of it), reference to "practical everyday knowledge" indicated that it also found justification by "common-sense" abilities. Certainly surprisingly (as the 1948 Commission's reasoning did not apply to Scotland, and the other Commissions did not mention it), reference to "participation... in the responsibilities of government" indicated justification by democracy (albeit as a poor third after economics and "common-sense" abilities). Very surprisingly (since the 1910 Commission rested strongly upon it, and the earlier ones may have done so too), "representativeness",

98 Para 41.

99 See Gray's comment in n 81 above.

100 *Proposals for Reorganising Lay Summary Justice* (n 92) para 27.

101 See Gray's comment in n 81 above.

102 *Proposals for Reorganising Lay Summary Justice* (n 92) para 9 (i.e. 84,643 and 8,616 respectively, out of 209,973). The decline was attributed to increase in road traffic offences only triable by sheriffs, and the tendency of the legislature to create new offences only similarly triable.

103 Para 34. See also para 36.

whether "delegate" or "sample", seems not to have been much considered.[104] Most surprising of all, assertions about economics, "common-sense" abilities and democracy as justifications trumped actual knowledge of the inadequacies of abilities generally and pernicious tradition, as the White Paper concluded, in an apparent triumph of hope over experience, that:[105]

> . . . if adequate training and a regular routine of duties were provided for those who sit on the bench, lay summary courts could play an invaluable part in the Scottish system of criminal justice and relieve the sheriff court of a proportion of its summary criminal work.

Reflecting this conclusion, the actual proposals[106] would have retained a system of lay courts (indeed, with enhanced jurisdiction and penalties), based on the new local government Districts which were to replace burghs and counties,[107] but centralised through administration by the Scottish Courts Administration (employing the clerks), prosecution by the Crown Office (providing procurators fiscal), and appointment of all its judges by the Crown (as JPs, removing bailies, as such) on the advice of Advisory Committees (expected to ignore "political balance").[108] No less importantly, there would be minimum sitting and training obligations upon JPs, and benches of three or more required. Oddly though, on the one hand, their clerks would now be unqualified (making these courts truly lay, and putting even heavier responsibility on justices' training), while on the other, "professional judges [were to] make a significant contribution to the justices' court"[109] by extending the use of Stipendiary Magistrates (somewhat undermining the general thrust, and suggesting bet-hedging reliance on the tradition of professionalisation).[110]

However, after consultation, which revealed a strong preference for professional courts within the legal profession, the Government abandoned its original reasoning, deciding that the need for "court-craft" (not "common sense") abilities trumped all other arguments, so "due process" required all courts to have a professional judge (though there would be insufficient justices, anyway). Thus, in a *volte-face*, it produced a new plan, fully restoring the trend to

104 In passing, it observed that "persons appointed must represent all sections of the community, including a due proportion of women": para 34.

105 Para 3: para 8 recorded that, in 1970, of 209,973 summary proceedings, 116,714 (55%) were dealt with in sheriff summary courts, 84,643 (40%) in burgh courts and 8,616 (5%) in JP courts.

106 Para 6.

107 See Report of the Royal Commission on Local Government in Scotland (Cmnd 4150: 1969).

108 *Proposals for Reorganising Lay Summary Justice* (n 92) para 36, finally disposing of appointment as reward.

109 Para 45.

110 Paras 45-48.

professionalisation by forsaking lay courts altogether, in favour of a sort of "junior sheriff".[111]

But then there was a General Election, producing a new Government, greater urgency[112] and reduced time.[113] This new Government introduced a third plan.[114] In effect, this simply rebranded the Burgh, Police and old JP Courts as District Courts (since Districts would still replace burghs and counties), run by these Districts, which would be allowed to nominate a third of their councillors as justices *ex officio* (in effect restoring bailies, and risking revival of pernicious tradition). Also, single-justice benches and Stipendiary Magistrates, and professional legal advisers, would continue. In effect, a return to the *status quo* was proposed.

Paradoxically, then, what produced the District Courts Act 1975 was not the 1973 White Paper, which explicitly sought justification, but this third plan, which did not, and was adopted less for its intrinsic merits than as an unavoidable by-product of local government re-organisation,[115] with associated local authority lobbying.[116] Moreover, this system survived into the twenty-first century, despite replacement of Districts,[117] removal of *ex officio* justices[118] (though local authorities continued to make recommendations for appointment), and an admittedly unsuccessful challenge on article 6 independence and impartiality grounds to lay courts with local authority-employed clerks.[119]

The second and third plans (and thus the 1975 Act) could be analysed in terms of the five arguments. However, to do so would miss the point. The chief lesson of the wild swings of policy over this brief period (between purely lay and purely professional court, but ending up with the mixture as before) is that there was no real commitment to any justification, and pure contingency in what actually emerged. Lay courts again survived, and professionalisation remained checked, not because of arguments about democracy, representativeness or ability, but because in a difficult situation, they were, in broad terms, a cheaper option than any alternative, and continued to fulfil the role of local honours system.[120]

111 See HC Deb 18 Oct 1973, cols 306-307W.

112 See Summary Justice Review Committee, *Report* (n 4) para 7.16.

113 See ibid para 7.17.

114 HC Deb 15 Jul 1974, cols WA51-53.

115 Local Government (Scotland) Act 1973.

116 See Bankowski, Hutton and McManus, *Lay Justice?* (n 7) 17-18.

117 Local Government (Scotland) Act 1994.

118 Bail, Judicial Appointments, etc (Scotland) Act 2000 (in anticipation of an article 6 ECHR challenge following from *Starrs v Ruxton* 2000 JC 208).

119 *Clark v Kelly* [2003] UKPC D1, 2003 SC (PC) 77.

120 The uncertainty of survival was evident from Gray (n 34) para 1168, which observed that "[t]he future of the lay magistracy is now [*sic*] a controversial issue and is likely to remain so for the foreseeable future".

The 1973 Act was not radical after all, and relied on economics buttressed by pernicious tradition.

(e) Justifications and criticisms in the 2004 McInnes Report – full professionalisation at last?

One further generation after the 1973 Act, the "McInnes Report"[121] appeared in 2004. This included numerous recommendations on a variety of matters but, together with the subsequent 2005 White Paper,[122] constituted the most thorough examination of lay courts so far, and resulted (also in a paradoxical fashion) in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. This Act contained what again seemed one of the biggest changes in lay justice, transmuting District Courts into the new JP Courts, part of a unified judicial system. It also, therefore, demands close attention.

The Report was informed by research[123] and consultations.[124] The public consultations were actually unhelpful, for interesting reasons. The first showed significant support for lay courts, but the responses were predominantly from JPs.[125] The second, more broadly based, produced similar results, but the responses were doubtfully valid, with internally inconsistent and unreliable results.[126] Thus, the matter was decided "from an analysis of the recent history and current context for summary justice".[127] In other words, justifications were sought in terms of the needs of the legal system, rather than the desires of the public.

This "analysis of the recent history and current context" noted yet further decline in the use of District Courts, to perhaps a quarter of all criminal proceedings,[128] and related facts such as the contrast between recent investment in Sheriff Courts and neglect of some District Courts.[129] More importantly, it also raised "court-craft" ability issues in a radical fashion, by considering (like

121 Summary Justice Review Committee, *Report* (n 4).

122 Scottish Executive, *Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps* (2005).

123 See Summary Justice Review Committee, *Report* (n 4) para 1.12 and the pieces of research cited there.

124 These are outlined at paras 1.09-1.11 of the report.

125 Paras 1.9 and 7.5.

126 Paras 7.6-7.10, recording that 60% of respondents "saw a place for lay magistracy" but only 15% would want to be tried by lay justices, and that "perceptions of summary courts and their judges were sometimes inaccurate and confused". Again, professionals favoured professional judges, those "involved in" lay justice, lay.

127 Para 7.11.

128 Paras 7.17-7.19.

129 Paras 7.20-7.21 (neglect followed removal of local authority *ex officio* justices after *Clark v Kelly* [2003] UKPC D1, 2003 SC (PC) 77).

the second 1973 plan) whether lay courts were inherently unsuitable for legal work, at least as the Committee saw it developing. There was some evidence of "a lack of confidence in the district court among procurators fiscal",[130] but more substantially, there were a "new range of pressures" presented by the ECHR (as evidenced by *Clark v Kelly*);[131] a "pro-active bench" needed to cope with the intended cascading down of work from higher courts (coupled with increased use of alternatives to prosecution removing minor cases);[132] and there were doubts as to whether lay courts were able to provide the necessary new "sophisticated and differentiated approach to individual offenders"[133] (if only because of infrequent sittings and a lack of continuity).[134] Also, a clear trend towards professionalisation was noted across the Commonwealth, except in England and Wales where the much greater range of cases and sentencing powers rendered comparison unhelpful.[135]

Thus, while the whole Committee agreed on unifying all courts into a single judicial hierarchy (finally excluding any local authority involvement), a major split developed thereafter. The evidence outlined above pushed a large majority[136] towards recommending a wholly professional judiciary.[137] In a rejoinder to the minority's Note of Dissent, this majority focussed on two particular objections: "community participation" and cost.[138] On the former, it rapidly concluded that the existing lay bench was unrepresentative (in the "sample" sense), and that effort and expense in remedying this would be better spent on other things.[139] On the latter, at slightly greater length, it admitted that definitive research was lacking,[140] but concluded that lay courts might actually be more expensive, particularly if further substantial training were required.[141] Thus the need for "a system that employs only professionally qualified judges".[142] Overall, one gets the impression that the tradition of professionalisation was felt so strongly that the majority did not find it necessary to closely argue its case. Nevertheless, analysing its position in terms of the five arguments, we can see that justification in terms

130 Para 7.19.
131 [2003] UKPC D1, 2003 SC (PC) 77.
132 Summary Justice Review Committee, *Report* (n 4) paras 7.23-7.51.
133 Para 7.29.
134 Paras 7.26-7.29.
135 Paras 7.30-7.36.
136 Thirteen out of 15 members.
137 Summary Justice Review Committee, *Report* (n 4) paras 7.56-7.57.
138 Paras 7.58-7.72. See text around n 142 below for the actual formulation by the minority.
139 Paras 7.58-7.63.
140 Notwithstanding the research noted at para 1.12 of the report.
141 Paras 7.64-7.71.
142 Para 7.72.

of "common-sense" abilities was rejected *a priori*, and justifications in terms of "court-craft" ability, "sample" representativeness, and economy repelled on empirical grounds. Justification by democracy or tradition (modified or otherwise) were simply not canvassed.

The small minority's Note of Dissent[143] had asserted an undischarged burden of proof for change upon the majority[144] and posed the "particular objections" to which the majority had rejoined, i.e., whether lay involvement in summary justice was desirable in principle ("community participation"), and whether it was "possible and cost effective" to improve it to "fit in with a new unified system" and "safeguard and enhance its credibility" (cost).[145]

On the former objection,[146] the minority initially rested on the argument that lay participation is desirable in principle as "a powerful expression of community participation in the regulation of society".[147] This was backed by observing the paradox whereby only the extremes of criminal proceedings involve lay participation, but without resolving it, though nevertheless concluding for increased participation, by quoting the 2004 *Auld Report* in England and Wales on the important "symbolic effect of lay participation",[148] and by asserting (somewhat surprisingly) a "cultural and political tradition" – presumably of "voluntary action", not vehicle for rewards – of lay justice.[149] The minority also challenged the majority view on empirical questions of both representativeness[150] and ability,[151] and, citing Lord Thomson, on proper appreciation of how far the "key qualities" of a judge could be achieved by lay judges assisted by legal advisers and "sound training".[152]

On the latter objection,[153] the minority considered that other reforms already in place alleviated the problems, and was unconvinced that abolition would actually deliver speedier summary justice, seeing estimations of the effects of fiscal fines, etc, as over-sanguine, and considering there was over-reliance on English experiences. Nor did it find any public pressure for abolition.[154]

143 Annex A: see especially paras 69-75.
144 Annex A para 2.l.
145 Annex A para 5. See also paras 33-36: note the majority's reformulation, discussed at text around n 138 above.
146 Annex A paras 7-20 ("Arguments for lay justice").
147 Annex A paras 7 and 33-36.
148 The quotation is from Auld, *Review of the Criminal Courts in England and Wales* (n 13) para 4.13.
149 Summary Justice Review Committee, *Report* (n 4) annex A paras 8 and 9.
150 Annex A paras 12-15.
151 Annex A para 11.
152 Annex A paras 16-20 and 33-36 (quoting from a booklet entitled 'What Scots Magistrates Should Know").
153 Annex A paras 21-32 ("Will abolishing lay justice help to solve the current issues in the summary justice syste[m]?").
154 Annex A para 24.

The minority, therefore, relied on for justification all five of democracy; "sample" representativeness; both "common-sense" and "court-craft" ability; economy; and (in a somewhat English form) tradition. Its criticisms were commensurately muted. Accepting current levels of representativeness and ability as less than optimal, it desiderated national selection of lay justices (with public advertisement, and transparent and fair selection),[155] and training (competence-based, building upon what the District Courts Association was doing).[156] Seeing variable local authority support as the source of most shortcomings,[157] it concluded that unification would suffice to rectify them,[158] recommending Scottish Court Service administration of lay courts, with Sheriff Principals responsible for "the speedy and efficient disposal of all summary criminal business",[159] and (more consistently with their general thrust than the original 1973 plan had managed) the possible abolition of Stipendiary Magistrates.

Thus, the Report was unanimous on the need for a "unified summary court system",[160] but split on lay courts, a large majority favouring abolition chiefly on ability and economy arguments, thereby completing the trend to professionalisation.

(f) Justifications and criticisms in the 2005 White Paper, and the 2007 Act – new lay JP Courts

However, it is the minority dissent in the McInnes Report, and its proposals, which are important. Paradoxically, the Scottish Executive formulated policy largely in line with the former,[161] and produced legislation largely effecting the latter.[162] Thus, a unified court system was achieved, but lay courts again preserved.

The *Summary of Responses*[163] to a further consultation undertaken by the Scottish Government showed that they focused upon the two issues of unification (broadly favoured), and lay courts (overwhelmingly favoured).[164]

155 Annex A paras 61-64.
156 Annex A paras 65-66.
157 Annex A paras 44-45.
158 Annex A paras 46-57.
159 Annex A para 47.
160 Para 5.47 and Ch 5 generally.
161 See Scottish Executive, *Smarter Justice, Safer Communities* (n 122) para 10.
162 Criminal Proceedings etc. (Reform) (Scotland) Act 2007.
163 *Report of the Summary Justice Review Committee: Summary of Responses to the Written Consultation* (2005), available at *http://www.scotland.gov.uk/Publications/2005/02/20736/53117*. See especially paras 1-5 of the Executive Summary and paras 2.6-2.7.
164 Paras 6-13 of the Executive Summary, paras 4.5-4.8 and paras 5.3-5.4.

Responses on the latter adopted "Note of Dissent" views,[165] lengthily developed through familiar supporting arguments, but analysed under rubrics such as "The Historical Argument", and "Excessive Bureaucracy, Delays and Low Cost Efficiency".[166] A few contrary views were expressed, declaring lay courts to be "an anachronism"[167], not cost-effective, and requiring improvements in recruitment, training and assessment.[168]

However, as with the original consultation, most responses were found to be from JPs or JP organisations,[169] so more probing supplementary research was commissioned, focussing on "community involvement".[170] This offered three "formal methods" of such involvement:[171] as "a judge for court cases involving minor offences",[172] deciding "what types of community service work is to be conducted",[173] or "supervising offenders doing community service work".[174] Only a quarter of respondents favoured the first and, overall, very few were seriously interested in formal involvement at all.[175] This was for several reasons, including fear of retribution, the need for training and, crucially, the unpaid nature of the work involved.[176] So, again, this produced uncertain conclusions on inferred public desires, but it did not throw policy-makers back to the needs of the system (or, indeed, to economics) but to basic political principles.

The ensuing 2005 White Paper set out to be radical. It recognised that for most purposes criminal justice *is* summary justice, and sought "a different way" of delivering it, which would be largely through lay involvement.[177] After a review of the history of the McInnes Report,[178] consideration of various aspects of community involvement in summary justice[179], and a list of desiderata including engaging "local people",[180] the White Paper produced a plan of action to deliver this goal, amongst others.[181]

165 Paras 6 and 8-10 of the Executive Summary, paras 4.5, 4.9 and table 4.1.
166 Para 7 of the Executive Summary and paras 4.10-4.82.
167 Para 4.84.
168 Paras 4.83-4.92.
169 Para 8 of the Executive Summary and paras 2.7, 2.13 (including tables 2.1, 2.3), 3.2, 3.4, 3.6 and 13.4.
170 *Report of the Summary Justice Committee: Supplementary Research: Final Report* (2005), available at *http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/19008/MRUKreport*).
171 Ch 5.
172 Paras 5.3-5.8.
173 Paras 5.3-5.4 and 5.9-5.13.
174 Paras 5.3-5.4 and 5.14-5.16.
175 Paras 5.27 *et seq*.
176 Para 5.7.
177 Scottish Executive, *Smarter Justice, Safer Communities* (n 122) introduction paras 2-7 and para 1.1.
178 Introduction paras 8-11.
179 Introduction paras 12-24
180 Introduction paras 25-26.
181 Introduction paras 27-29.

A key issue in the White Paper's reasoning was thus "whether lay people should continue to have a formal role as judges in the... criminal justice system",[182] and it concluded that lay justices represented "a powerful expression of the partnership we seek between professionals and communities"[183]. Therefore, there continued to be a place for them, which might even develop further, though there was "a need to invest in recruitment, training and appraisal".[184] This was asserted to be not "simply a vote for 'business as usual'",[185] because "a new 'contract' with lay justices" was sought.[186] So, in terms of the five arguments, policy rested almost entirely on democracy as justification, albeit with an eye to requirements of ability (though without recognising any "common-sense" / "court-craft" distinction). Although the McInnes minority had also rested on representativeness, economy and tradition, the 2005 White Paper did not.

The remainder of that part of the White Paper devoted to lay courts laid out consequential issues (save, oddly, in relation to Stipendiary Magistrates).[187] The plan of action would retain lay justices (though possibly rebranded "community justices", and supplemented by "signing justices" for the notarial responsibilities). They would be recruited through rigorous and transparent processes by Sheriffdom JP Advisory Committees chaired by Sheriff Principals, and be appointed for presumptively renewable fixed terms of five years until age 70. They would also be trained by better and more consistent means, managed nationally, and appraised regularly by transparent criteria. The plan as a whole would be phased in with court unification.[188]

This plan became law in the 2007 Act with, generally, only minor changes[189]. (The "JP" title was retained and "signing justices" dropped, with relevant duties passing to councillors, but more significantly – in another piece of possible bet-hedging – Stipendiary Magistrates were preserved despite hardly being obvious products of the democracy argument).

This *démarche* is certainly more radical than its predecessor. For the first time, not only is democracy unequivocally used as a justification, but also almost no other justification is offered. However, what is most radical is arguably something more consistent with professionalisation than with lay justice, that is, the unification of all courts into a single hierarchy, finally removing any local

182 Para 1.8.
183 Para 1.19.
184 Para 1.20. See also para 1.26.
185 Para 1.24.
186 Para 1.25.
187 Para 1.64. See also paras 1.24-1.63.
188 Paras 1.63-1.64.
189 Criminal Proceedings Etc. (Reform) (Scotland) Act 2007 Part 4.

authority involvement. Nevertheless, although fewer cases are now taken by lay courts than were fifty years ago, and the pernicious tradition of appointment as a vehicle for reward has finally been scotched, the trend to professionalisation seems again to have been stayed.

D. CONCLUSIONS

Lay courts are a major feature of British criminal justice. In Scotland, the modern, lay, JP Court takes over 40% of all criminal cases. But why prefer lay courts to professional ones? This question has rarely been properly considered, though recent re-evaluation of criminal justice in Northern Ireland produces a basis for discussion, revealing contemporary arguments in terms of democracy, representativeness, abilities, economics and tradition.

These arguments play particularly interestingly in relation to Scotland, because the modern JP Court is a surprising survivor of a clear tradition of professionalisation over the centuries (very different from the powerful tradition of lay courts in England and Wales). This tradition is evidenced in the history of the Court of Session, High Court of Justiciary, and Sheriff Courts. So, why did Burgh and JP Courts not follow Barony Courts to extinction? Such examinations of them as there have been in the last two centuries expressed justifications rarely, and criticisms frequently, chiefly on the grounds of lay judges' lack of ability and unrepresentativeness, and of the pernicious tradition of the use of the office of JP as a local honours system.

Nevertheless, by the skin of their teeth these courts survived. Moreover, their cheapness in a time of increasing minor regulatory crime, and their usefulness in local politics, produced a remarkable revival of their fortunes in the twentieth century, chiefly through the establishment of Police Courts, with standardised summary procedure, at the same time as the rise of "regulation". Thus, professionalisation was checked.

The apparently radical reforms of the 1970s merely reinforced this existing check, after a variety of plans demonstrating lack of commitment to any particular justification. District Courts were created as mere by-products of local government reorganisation, grounded more in contingency than principle.

In 2004, the McInnes Report majority, focussing on the appropriate development of legal institutions, so accenting questions of ability, would have completed the trend to professionalisation on "due process" grounds (reinforced by an apparently continuing decline in lay courts, and their lack of representativeness). However, the minority dissent, conceding unification with professional courts, but rejecting professionalisation, was seized upon

by an Executive which, unconcerned by legal opinion, eager to embrace *a priori* arguments from democracy, and seeing representativeness as achievable, abilities as improvable, economy not an issue, and tradition irrelevant, sought to strengthen lay courts. Professionalisation seems not checked but reversed.

But Lord Gill's views show that the fat lady has not yet sung.[190] Though lay courts have recently taken more criminal cases, they are not used for the majority of them, the proportion peaking a century ago. They survived recent reviews less on their merits than on paradoxical outcomes of extraneous events. If they are to survive further, they may be able to rely on continuing commitment to participatory democracy, but probably need to convince that lay justices possess not only "common-sense" abilities which professionals may lack, but also that they have "court-craft" abilities, or are significantly cheaper (or, preferably, both). Tradition seems the weakest argument.

190 See n 6 above. Since this article was written, Lord Gill has been appointed Lord President.